

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NIMO ABDULLAHI)	
Claimant)	
VS.)	
)	
CARGILL MEAT SOLUTIONS CORP.)	Docket Nos. 1,060,819
Respondent)	&1,060,820
AND)	
)	
CHARTIS CASUALTY CO.)	
Insurance Carrier)	

ORDER

Claimant requests review of the June 16, 2014, Award by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on October 14, 2014.

APPEARANCES

Stanley R. Ausemus, of Emporia, Kansas, appeared for claimant. D. Shane Bangerter, of Dodge City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the entire record and adopted the stipulations listed in the Award.

ISSUES

Claimant sustained compensable accidental injuries on June 9, 2011, (#1,060,819) and January 25, 2012, (#1,060,820). In both claims, the ALJ found the opinions of Drs. Hunsberger and Carabetta to be persuasive, and concluded claimant sustained no permanent injury or permanent impairment of function as a result of either accidental injury. The ALJ declined to award claimant permanent partial disability benefits and future medical treatment.

Based on the ratings of Dr. Brown, claimant argues she is entitled to awards for minimums of 16 percent permanent whole body functional impairment in each claim. Claimant also maintains she is entitled to future medical treatment.

Relying on Dr. Carabetta's opinion that claimant did not have a rateable injury and Dr. Hunsberger's opinion that claimant's injuries were resolved, respondent contends the Award should be affirmed.

The issues for the Board are:

1. What is the nature and extent of claimant's disability?
2. Is claimant entitled to future medical treatment?

FINDINGS OF FACT

Claimant injured her left shoulder, arm, hand, back and head on June 9, 2011, when she slipped and fell in the cafeteria area of respondent's facility. On January 25, 2012, she injured her right hand, arm and shoulders when she developed pain while trimming meat using a meat hook and a dull knife. Claimant received conservative treatment by Dr. Hunsberger. Claimant was examined by Drs. Carabetta, Stein and Brown.

Claimant testified she experiences constant pain down her left arm from her left shoulder to her fingers. She rated her left-sided pain at seven on a pain scale of zero to ten. If she tries to raise her left arm more than 90 degrees, she has sharp pain and numbness from her left shoulder to her elbow down to her fingers. She has pain in the back side of her left upper body. The fingers on her left hand sometimes lock up. Claimant's left arm awakens her with sharp pain and numbness. She uses ice packs and pain medication at bedtime. Claimant states her middle back hurts when she bends, twists, stands or walks. She testified her spine makes a clicking sound.

Claimant testified she experiences pain in the right shoulder and elbow down to the fingers, with constant pain in the right arm and right shoulder. She claims her right upper extremity pain is eight on a zero to ten pain scale, and she can barely raise her right arm because to do so creates sharp pain in the right shoulder. Claimant testified she is unable to perform housework and requires assistance lifting her one month old child.

No medical depositions were taken. However, the parties entered into a written stipulation filed on December 10, 2013, in which claimant and respondent agreed the medical records of Dr. Hunsberger, the authorized treating physician; the reports of Drs. Carabetta and Stein, the court-ordered neutral examining doctors; and the report of Dr. Brown, claimant's examining physician, be admitted into evidence.

Terry R. Hunsberger, D.O., provided claimant with conservative treatment from February 9, 2012, through March 15, 2012. His chart entries are summarized as follows:

February 9, 2012

Claimant could not keep her knife sharp and had to use a lot of force to cut the meat. She had pain in her right elbow at eight on a zero to ten pain scale, radiating up into her right shoulder. She was able to flex and extend her right elbow and could supinate and pronate. Strength in upper extremities was equal and physiologic bilaterally. There was no torn biceps. Dr. Hunsberger's diagnostic impression was insertional tendinitis. The doctor recommended ibuprofen, Tylenol, warm moist heat; an elbow strap; and reevaluation in two weeks.

February 23, 2012

Claimant did not take her ibuprofen and Tylenol as instructed, but she did take it occasionally. Her pain was still at six-seven on a zero to ten pain scale. She had full range of motion of her right shoulder, elbow and wrist. Dr. Hunsberger recommended claimant take medications as instructed; use warm moist heat; and reevaluation in two weeks.

March 8, 2012

Claimant was performing a tender trimmer job and had not improved. Her pain was still rated at six in her right elbow, forearm and shoulder. Dr. Hunsberger's recommendations were to switch claimant to Aleve; to use Flexeril at the beginning of her work shift; reevaluation in one week; and, if claimant did not improve, place her at maximum medical improvement and have claimant bid for a different job.

March 15, 2012

Claimant's right shoulder and elbow were much better and x-rays were negative. She had full range of motion in the right shoulder and right elbow. Dr. Hunsberger placed claimant at maximum medical improvement and returned her to her normal duties without limitations or disabilities.

Claimant was examined by Dr. C. Reiff Brown, a board certified orthopedic surgeon, on November 8, 2012, for a medical evaluation at her attorney's request.

Dr. Brown found severe rotator cuff tendinitis in both shoulders; restriction of shoulder range of motion bilaterally; nondescript pain and tenderness extending down both arms, encompassing the medial humeral epicondyles bilaterally; dorsal wrist pain; negative Tinel sign; no neurologic or nerve impingement syndrome; and myofascial pain syndrome.

Pursuant to the *Guides*,¹ Dr. Brown opined claimant sustained permanent partial impairment of function of the right and left upper extremities. Dr. Brown combined these

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

values for a total of 16 percent permanent partial impairment of function of the body as a whole for each injury.

Dr. Brown suggested additional treatment, consisting of an orthopedic consultation, including diagnostic testing; physical therapy to multiple areas; glenohumeral joint injections; myofascial trigger point injections; anti-inflammatory medication; and work restrictions.

Dr. Paul Stein, a board certified neurosurgeon, examined claimant on April 1, 2013, for a court-ordered neutral medical evaluation.

At the time of Dr. Stein's examination, claimant reported pain in both shoulders, the right greater than the left. The pain increased with use of either upper extremity. The pain on the right was from the shoulder down the arm into the fingers. The right shoulder pain was at seven or eight on a ten point pain scale. The left shoulder had been up to five. Lower back pain was constant with no radiation into either lower extremity. Walking, standing still, sitting still, and lying down were all painful, ranging from six to eight. Claimant was taking no medication at the time of the exam.

Dr. Stein reviewed the records of Danny Briggs, RPAC, who treated claimant from June 22, 2011, to November 30, 2011. On November 30, 2011, Mr. Briggs saw claimant for a final followup, at which time claimant denied having any pain. Mr. Briggs' assessment was claimant's back pain had resolved and she was returned to work with no restrictions.

Dr. Stein found claimant was in no acute distress. He observed claimant had difficulty responding to specific requests during the examination. Gait and station were intact. Cervical range of motion was restricted in extension and rotation to the left, but sometimes more in other directions. As a result, Dr. Stein could get no sense of true movement. Claimant jumped at palpation of the neck, shoulder girdles, upper back, mid-back and low back. No muscular spasm was appreciated.

Dr. Stein attempted to measure shoulder range of motion with a goniometer, but claimant made very little movement. Claimant maintained the position of the arm. Dr. Stein discontinued the examination because he felt he was not getting valid and reasonable responses.

Dr. Stein was not sure if the difficulty with the examination was cultural or due to the use of an interpreter. Claimant's responses to Dr. Stein's questions contradicted the histories in other medical reports and records. Dr. Stein could not make a statement regarding the presence or absence of any injury.

Dr. Vito J. Carabetta, board certified in physical medicine and rehabilitation, conducted a neutral medical evaluation on September 27, 2013. Claimant complained of tingling, numbness and pain in both upper limbs and pain in her upper back. The right upper extremity

was in pain constantly. Symptoms on the left were intermittent. All complaints were unimproved and worsening. Increased activity worsened her symptoms.

Dr. Carabetta found claimant had upper back pain and upper extremity dysesthesias. Claimant limited her cooperation on examination. Her mobility in the axial skeleton was good and when distracted, she had full mobility in her upper limbs. As claimant had subjective complaints absent objective findings, Dr. Carabetta opined, pursuant to the *Guides*, claimant had no ratable impairment. Claimant had no diagnosis identifiable in the upper limbs. Based on her complaints alone, a two percent or three percent impairment of each upper limbs could be made, however, using the *Guides* there is no ratable impairment.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.²

"Burden of proof" means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.³

The existence, nature and extent of the disability of an injured worker is a question of fact.⁴ The finder of fact is free to consider all the evidence and decide the percent of disability the claimant sustained.⁵ The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making his own determination.⁶ Medical testimony is not essential to the establishment of the existence, nature and extent of an injured worker's disability.⁷

K.S.A. 2011 Supp. 44-510h(e) provides in relevant part:

It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing,

² K.S.A. 2011 Supp. 44-501b(c) and K.S.A. 2011 Supp. 44-508(h).

³ K.S.A. 2011 Supp. 44-508(h).

⁴ See *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995), *rev. denied* 259 Kan. 927 (1996).

⁵ See *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

⁶ See *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 *rev. denied*, 249 Kan. 778 (1991).

⁷ See *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee . . . shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

1. Nature and Extent of Disability

The Board agrees with the ALJ that claimant did not sustain her burden of proof that she sustained a permanent injury or permanent impairment of function as a consequence of either of her accidents.

On March 15, 2012, Dr. Hunsberger placed claimant at maximum medical improvement and returned her to her normal duties without limitations or disabilities. Because claimant had only subjective complaints without objective manifestation, Dr. Carabetta opined, pursuant to the *Guides*, claimant had no ratable impairment. On November 30, 2011, Mr. Briggs, the therapist, followed-up with claimant for a final assessment. At that time, claimant made no complaints of pain. Mr. Briggs assessment was that claimant's back pain had resolved and she was returned to work with no limitations or disabilities.

Claimant did not cooperate with the examinations of Dr. Stein and Dr. Carabetta. Claimant's multiple complaints of severe pain and other symptoms seem substantially out of proportion to her objective findings and the efforts of the physicians to identify her diagnoses, if any. The Board agrees with the ALJ that the opinions of Drs. Hunsberger and Carabetta are more credible and are entitled to greater weight than the other evidence in the record. Claimant proved no permanent injury and no permanent functional impairment.

2. Future Medical

When Dr. Hunsberger found claimant had reached maximum medical improvement on March 15, 2012, a presumption arose that respondent's obligation to provide further medical treatment was terminated. That presumption may be overcome by medical evidence establishing additional medical treatment will be necessary. However, claimant did not overcome the presumption. The only suggestion that future treatment will be needed comes from Dr. Brown, claimant's examining physician. The rest of the medical evidence, including Dr. Hunsberger's records, Dr. Stein's report, and Dr. Carabetta's report, indicates no further treatment will be required to cure and relieve the effects of claimant's injuries. Since the presumption has not been overcome, the ALJ properly did not award future medical treatment.

CONCLUSIONS

1. Claimant did not prove she sustained permanent injury or permanent functional impairment as a result of her two accidents, and she is accordingly not entitled permanent partial disability benefits.

2. Claimant is not entitled to future medical treatment.

Having reviewed the entire evidentiary file, the Board finds the Award of the ALJ should be affirmed in all respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated June 16, 2014, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of October, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Pamela J. Fuller, Administrative Law Judge